

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF LABOR AND INDUSTRY

Steve Sviggum,  
Commissioner of the Minnesota  
Department of Labor and Industry,

Complainant,

vs.

Nova-Frost, Inc,

Respondent.

**FINDINGS OF FACT,  
CONCLUSIONS AND  
RECOMMENDATION**

This matter came on for a hearing before Administrative Law Judge Manuel J. Cervantes (ALJ), pursuant to a Notice of and Order for Hearing filed on November 3, 2008. The matter was heard on January 13, 2009, at the Office of Administrative Hearings, 600 North Robert Street, St. Paul, Minnesota 55164-0620. The record closed at the conclusion of the hearing.

Julie A. Leppink, Assistant Attorney General, Suite 900, 445 Minnesota Street, St. Paul, MN 55101-2127, appeared on behalf of the Minnesota Department of Labor and Industry (Commissioner).

Michael Frost, Vice-President, appeared on behalf of Nova-Frost, Inc. (Respondent).

**STATEMENT OF ISSUES**

1. Was the excavation trench which Respondent created, and which was inspected on June 25, 2008 by Minnesota Occupational Safety and Health (MnOSHA) Investigators, in violation of 29 C.F.R. § 1926.652(a)(1)?

2. If so, was the Citation and Notice of Penalty, issued by the Commissioner pursuant to the Minnesota Field Compliance Manual, Chap. VI, Penalties (Penalty Man.), appropriate?

The ALJ concludes that the Commissioner has demonstrated by a preponderance of the evidence that Respondent violated 29 C.F.R. § 1926.652(a)(1) by

not taking the requisite precautionary measures to ensure the safety of employees working at that time and place. Respondent failed to properly slope the excavation trench, or utilize an alternative protective system, contrary to MnOSHA regulation. The amount of penalty imposed by the Commissioner was appropriate under the circumstances in light of the severity and probability of the risk, reduced by credits for employer size, good faith, and violation history.

Based on all the files, records, and proceedings herein, and for the reasons set forth in the accompanying memorandum, the ALJ makes the following:

### **FINDINGS OF FACT**

1. On June 25, 2008, two MnOSHA investigators conducted an inspection of a trench at a construction site where Respondent was installing a new storm sewer for a Shopko parking lot in North Branch, Minnesota. MnOSHA's protocol is to inspect anytime an excavation is observed.<sup>1</sup> Respondent was the excavation subcontractor responsible for this portion of the project and when the investigators arrived they saw a couple of its employees working in the trench.<sup>2</sup>

2. Ryan Nosan is a principal safety investigator for MnOSHA. He has worked for MnOSHA for over seven (7) years. He obtained his B.S. degree in Community Education and an M.S. degree in Environmental Health and Safety. He has been the principal investigator in over eighty (80) investigations and has participated in approximately one hundred and fifty (150) investigations overall. Nosan serves as a mentor to new investigators.<sup>3</sup> Todd Busch accompanied Nosan on this inspection. Busch obtained a B.S. degree in Biology and a M.S. degree in Environmental Safety and Health. At the time of the inspection, Busch had been employed with MnOSHA for approximately one (1) year.<sup>4</sup>

3. The investigators made contact with the project superintendent and Jason Lauritsen (Lauritsen), Respondent's project foreman and backhoe operator. They were informed of the purpose of the inspection; specifically, to review whether the job site was in compliance with Occupational Safety and Health regulations. During the course of the inspection, the investigators also interviewed Respondent's employees and took photographs of the site.<sup>5</sup>

4. The two investigators, the superintendent, and Lauritsen conducted a walk-around of the project. Nosan and Lauritsen took various measurements of the trench.<sup>6</sup> They took measurements of the depth of the trench and the width of the trench

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<sup>1</sup> Testimony (test.) of Ryan Nosan.

<sup>2</sup> Ex. 1 and test. of R. Nosan.

<sup>3</sup> Ex. 1 and testimony of R. Nosan.

<sup>4</sup> Test. of Todd Busch.

<sup>5</sup> Ex. 1; Busch took all Department photographs.

<sup>6</sup> Ex. 1 and test. of R. Nosan.

at the top or at ground level.<sup>7</sup> All measurements were agreed upon by Lauritsen and the investigators.<sup>8</sup>

5. Lauritsen and Nosan agreed at the inspection site that the base of the trench was approximately eight feet wide, or the same as two backhoe bucket widths.<sup>9</sup> At the hearing however, Lauritsen testified that the trench he dug only needed to be the width of the manhole fixture, which is four (4) feet wide.<sup>10</sup> The credible evidence, through the Commissioner's photographs, clearly shows the trench width to be at least one foot wider on either side of the manhole fixture.<sup>11</sup> The photos also show that the trench was partially backfilled because the 18 inch sewer pipe is completely covered with soil.

6. There was a slight variation of the depth of the trench: it was measured at six and one-half (6 ½) feet at one end of the trench and seven feet (7) deep at the other.<sup>12</sup> The opening at the top of the trench varied as well: at one end the width was approximately sixteen (16) feet and at the other end, it was about eighteen (18) feet.

7. While Lauritsen denied that he assisted with a measurement at the south end of the trench, he did not deny Nosan's testimony that Lauritsen was present when the measurements were taken on June 25, that Nosan measured a seven (7) feet depth at the corner of a vertical drop as seen in Exhibits 2(e), (g) and (h), nor did he deny Nosan's testimony that he was in agreement with those measurements on that date.<sup>13</sup>

8. Excavations deeper than five feet require appropriate sloping per MnOSHA regulation.<sup>14</sup> Minnesota investigators consider excavations deeper than five feet to pose imminent danger from cave-ins, crushing hazards, and asphyxiation.<sup>15</sup> There were no visible safety or protective systems at this trench. A violation of 29C.F.R. § 1926.652 (a)(1) is considered to be serious because of the potential consequences of serious injury or death.<sup>16</sup>

9. The investigators also conducted a visual and plasticity test on the soil. The investigators determined, and Lauritsen agreed, that the soil type was Class C, the least cohesive of soils.<sup>17</sup> Nosan attempted to compress soil into a ball with his hands, but the soil would not bind.<sup>18</sup>

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<sup>7</sup> Ex. 1 and test. of R. Nosan.

<sup>8</sup> Ex. 1.

<sup>9</sup> Ex. 1 and test. of R. Nosan.

<sup>10</sup> Test. of Jason Lauritsen.

<sup>11</sup> Ex. 2(d), (e), (f), (g), and (i).

<sup>12</sup> Ex. 1; test. of R. Nosan and T. Busch.

<sup>13</sup> Test. of R. Nosan, Ex. 2(e), (g) and (h).

<sup>14</sup> Test. of R. Nosan and 29C.F.R. 1926.652 (a)(1).

<sup>15</sup> 29 C.F.R. 1926.652 (a)(1), Ex. 3, 5; test. of R. Nosan, and T. Busch.

<sup>16</sup> Test. of R. Nosan and T. Busch.

<sup>17</sup> Test. of R. Nosan.

<sup>18</sup> Test. of R. Nosan.

10. When the soil type is Class C, 29 C.F.R. § 1926.652 (a)(1) requires that sloping at the excavation trench be at 34 degrees or less to avoid cave-ins.<sup>19</sup>

11. In order to have a 34 degree slope, the width at the top of the trench would have needed to be 26-29 feet wide. Additionally, the trench did not have a support or shield system in place or adequate benching to protect the employees.

12. The existing slope was not adequate enough to comply with regulations and, therefore, did not adequately eliminate the serious risk to employees.

13. Respondent was issued a Citation and Notification of Penalty on July 3, 2008.<sup>20</sup>

14. The Commissioner based the penalty calculation on the Penalty Man.<sup>21</sup>

15. In calculating penalties, a severity rating is assigned to each violation. The severity rating is based upon a scale, ranging from A (a violation unrelated to injury) to F (violation that could result in death, permanent total disability, or 60 percent or greater permanent partial disability).<sup>22</sup> Additionally, the probability that an injury or illness will occur due to a violation is considered separately from the severity of such injury or illness.<sup>23</sup> There are four (4) probability factors: employee exposure; proximity to a hazard; duration of a hazard; and work conditions. Each factor is rated from 0 to 2 and the numbers are added together to determine the total probability rating for purposes of penalty calculation.<sup>24</sup>

16. On the severity scale from A to F, Nosan assigned an “F” because of an “expected” serious injury or death due to a bank cave-in of a trench of six (6) feet or deeper.<sup>25</sup>

17. On a probability scale involving employee exposure to a hazard, Nosan assigned a factor of “2” because he witnessed two (2) employees working in the trench when the investigators arrived.<sup>26</sup>

18. On a probability scale involving employee proximity to a hazard, Nosan assigned a factor of “2” because employees were required by job assignment to physically work in the hazardous trench area as part of their normal work duties.<sup>27</sup>

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<sup>19</sup> Test. of R. Nosan; Ex. 1 and 29 C.F.R. 1926.652 (a)(1).

<sup>20</sup> Ex. 3.

<sup>21</sup> Test. of R. Nosan, Busch, Ex. 3, and 4, the MnOSHA Field Compliance Manual, Chapter VI (Rev.8/05).

<sup>22</sup> Ex. 4, p. VI-2.

<sup>23</sup> Ex. 4, pp. VI-3 through VI-7.

<sup>24</sup> *Id.*

<sup>25</sup> Test. of R. Nosan and Ex. 4, p. VI-2.

<sup>26</sup> Test. of R. Nosan and Ex. 4, p. VI-4.

<sup>27</sup> Test. of R. Nosan and Ex. 4, p. VI-5.

19. On a probability scale involving the duration of hazard, Nosan assigned a factor of "1" because he assessed an employee's exposure to the hazard to be from 10-50 percent of the normal work day.<sup>28</sup>

20. On a probability scale involving adverse work conditions, Nosan assigned a factor of "1" because the investigators witnessed other construction in the immediate vicinity of Respondent's project. Vibration from ongoing digging and construction of a gas station on an adjacent property could have had an adverse effect on the storm sewer trench.<sup>29</sup>

21. There is factual support in the record for Nosan's ratings and the ALJ adopts them as his own.

22. Taking the cumulative Severity and Probability rating of F6, the scheduled gross penalty is \$5000, unadjusted for credits.<sup>30</sup>

23. Respondent was given a 55 percent credit against the scheduled fine because of its size, employing 25 employees or less.<sup>31</sup>

24. Respondent was given a 10 percent credit against the scheduled fine because of Respondent's good faith.<sup>32</sup>

25. Respondent was not entitled to a history credit because it had a previous willful OSHA violation.<sup>33</sup>

26. Taking a total deduction of 65 percent against a scheduled \$5,000 fine leaves a remaining balance of \$1,750.

27. Respondent initiated this contested case proceeding by timely filing a Notice of Contest.

## **CONCLUSIONS**

1. The ALJ and the Commissioner of Labor and Industry have jurisdiction over this matter pursuant to Minn. Stat. §§ 14.50, 182.661, subd. 3 and 182.664.

2. The Notice and Order for Hearing and Prehearing Conference was proper in all respects and the Commissioner has complied with all procedural requirements of law and rule.

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<sup>28</sup> Test. of R. Nosan and Ex. 4, p. VI-6.

<sup>29</sup> Test. of R. Nosan and Ex. 4, p. VI-6.

<sup>30</sup> Test. of R. Nosan and Ex. 4, p. VI-24; a factor of 6 was arrived at by adding the factors found in paragraphs 16-19 above.

<sup>31</sup> Test. of R. Nosan and Ex. 4, p. VI-9.

<sup>32</sup> Test. of R. Nosan and Ex. 4, p. VI-8.

<sup>33</sup> Test. of R. Nosan.

3. Respondent is an employer as defined by Minn. Stat. § 182.651, subd. 7.

4. Minn. Stat. § 182.653, subd. 3 requires each employer to comply with Occupational Safety and Health Standards or Rules adopted pursuant to Minn. Stat. ch. 182.

5. The Commissioner has the burden of establishing an OSHA violation by a preponderance of evidence.

6. 29 C.F.R. § 1926.652(a)(1) requires that:

Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section except when:

- (i) excavations are made entirely of rock, or
- (ii) excavations are less than 5 feet (1.52m) in depth and examination of the ground by a competent person provides no indication of potential cave-ins.

7. 29 C.F.R. § 1926.652 (b)(1)(i) requires that:

Excavations shall be sloped at an angle not steeper than one and one-half horizontal to one vertical (34 degrees measured from the horizontal), unless the employer uses one of the other options ....”

8. In order for the trench at the Shopko parking lot to be compliant with 29 C.F.R. § 1926.652, the formula for calculation is as follows: the depth of the trench<sup>34</sup> times soil type<sup>35</sup> plus the width at the bottom of the trench<sup>36</sup> determines what the minimal width at the top of the trench should be to comply with a 34 degree slope.<sup>37</sup>

9. Applying this formula to the trench in question, the width at the top should have been at least 26-29 feet. Given that the widest top dimension measured at the trench on June 25 was only 18 feet, the Commissioner has established an OSHA violation by a preponderance of evidence and that Respondent's employees were exposed to the cited hazard.

10. Under Minn. Stat. § 182.666, subd. 6, the Commissioner has authority to assess fines, giving due consideration to the appropriateness of the fine with respect to the size of the business of the employer, the gravity of the violation, the good faith of the employer, and the history of previous violations.

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<sup>34</sup> The ALJ found the depth of the trench varied from 6.5-7 feet.

<sup>35</sup> A factor of “3” is applied to Class C soil.

<sup>36</sup> The ALJ found the width at the bottom of the trench varied from 6-8 feet.

<sup>37</sup> Test. of R. Nosan and Ex. 1.

11. The record supports the Commissioner's penalty calculation regarding the severity and probability of harm. Adjusting the scheduled penalty in light of the statutory considerations contained in the immediate paragraph above, the net penalty of \$1,750 is reasonable.

12. These conclusions are reached for the reasons set forth in the memorandum below, which is incorporated by reference into these conclusions.

13. The Citation and Notification of Penalty is proper in all respects.

Based upon these conclusions, and for the reasons explained in the accompanying memorandum, the ALJ makes the following:

### **ORDER**

#### **IT IS ORDERED THAT:**

1. Citation 01, Item 001, issued for a violation of 29 C.F.R. § 1926.652(a)(1) on June 25, 2008 be, and is hereby, AFFIRMED.

2. The Respondent shall pay forthwith to the Commissioner the sum of \$1750.00.

3. If the penalty is not paid within 60 days after the fine becomes a Final Order, it must be increased to 125 percent of the originally-assessed amount. Furthermore, after 60 days, the unpaid fine shall accrue an additional penalty of 10 percent per month, compounded monthly until the fine is paid in full, pursuant to Minn. Stat. § 182.666, subd. 7 (2003).

Dated: February 10, 2009

s/Manuel J. Cervantes  
MANUEL J. CERVANTES  
Administrative Law Judge

Reported: Digitally recorded; no transcript prepared.

### **NOTICE**

This report shall be construed as a final decision of the Commissioner. Notice is hereby given that under Minn. Stat. § 182.664, subd. 3, this decision may be appealed to the Minnesota Occupational Safety and Health Review Board by the employer, employee, their authorized representatives, or any party, within 30 days following

service by mail of this decision. The procedures for this appeal are set out at Minn. Rules 5215.5000 to 5215.5210. Should anyone wish to appeal, please contact Carrie Rohling, Secretary to the Occupational Safety and Health Review Board, 443 Lafayette Road N., St. Paul, MN 55155.

## **MEMORANDUM**

The ALJ has carefully considered all the evidence in this case. The evidence included the documents and photographs submitted by the parties as well as the testimony of witnesses and their credibility. This was not a complicated case and turns on which version of the facts to accept with respect to the depth of the trench at the Shopko parking lot where Respondent was installing a new storm sewer on June 25, 2008.

If the ALJ accepts the Respondent's position that the trench was less than five feet, the safety precautions contained in 29 C.F.R. § 1926 do not apply, hence, there could be no violation. If, on the other hand, the ALJ accepts the Commissioner's version as to the depth, Respondent did violate the MnOSHA slope regulation, and the imposition of a penalty for doing so is appropriate.

The ALJ finds that the Commissioner established by a preponderance of evidence that Respondent violated the applicable regulation because the trench was deeper than six feet. Preponderance of the evidence means that the evidence establishes that it was more probable that something occurred than it did not occur. An illustration used by the courts when instructing juries is that if the scales weighing the evidence were to tip one way or the other, preponderance has been established.

Both investigators Nosom and Busch testified that Lauritsen, the project foreman and backhoe operator, had accompanied Nasom on the walk-around of the site and that Lauritsen assisted in some of the actual measurements. In addition, Nasom testified that both he and Lauritsen had agreed upon the measurements with respect to the width as well as the depth of the trench. At the hearing, Lauritsen objected to the width he required for setting the manhole fixtures. He said that he could cut a precise four foot trench in order to set a manhole fixture of four feet. While the ALJ finds Lauritsen's expert ability in operating the backhoe to be credible, the photographs tell a different version of facts in this instance. Photo Exhibits 2e, f, g and i clearly show a minimum of a foot on either side of the manhole fixture, thereby creating at least a six (6) width in that area. This casts doubt on Lauritsen's credibility and supports Nasom's testimony when he said that there was agreement that the bottom width of the trench was eight (8) feet or the width of two backhoe buckets.

As for resolving the depth of the trench issue, the most compelling reason for finding in favor of the Commissioner's witnesses is because Nasom testified that Lauritsen accompanied him in the walk-around, assisted in the taking of measurements, and they agreed as to the measurements themselves. Lauritsen did not deny this at the hearing. This fact, coupled with the extensive experience of nearly 150 investigations



by Nasom, adds credibility to the position of the Commissioner that Respondent violated MnOSHA regulation 29 C.F.R. 1926.652 (a)(1). The calculation of the penalty, including credits, was appropriate.

**M.J.C.**